

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Plaintiff

v.

CRIMINAL 09-0188 (JAG)

[1] JOHNNY PÉREZ-RIVERA,

Defendant

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
RE: RULE 11(c)(1)(A) & (C) PROCEEDINGS (PLEA OF GUILTY)

I. Personal Background

On May 28, 2009, Johnny Pérez-Rivera, the defendant herein, was charged in a three-count indictment. The defendant agrees to plea guilty to count one of the indictment.

Count one charges the defendant with aiding and abetting by another, did knowingly possess a stolen firearm, that is, a Glock pistol, caliber .45, bearing serial number FBS-065, that had been shipped and transported in interstate commerce, knowing and having reasonable cause to believe the firearm was stolen, in violation of 18 U.S.C. § 922(j) and § 2.

Pursuant to count three, 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c), the defendant stipulates, acknowledges and agrees to forfeit to the United States all right, title, and interest in any firearms and ammunition involved or used in furtherance of the commission of the offense enumerated in count one.

II. Consent to Proceed Before a Magistrate Judge

On July 29, 2009, while assisted by Héctor L. Ramos-Vega, Assistant Federal Public Defender, the defendant, by consent, appeared before me in order to change his previous not guilty plea to a plea of guilty as to count one of the indictment.

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In open court the defendant was questioned as to the purpose of the hearing being held. The defendant responded that the purpose of the hearing was to plead guilty. The defendant was advised of his right to have all proceedings, including the change of plea hearing, before a United States district judge. Defendant was given notice of: (a) the nature and purpose of the hearing; (b) the fact that all inquiries were to be conducted under oath and that it was expected that his answers would be truthful (he was also explained that the consequences of lying under oath could lead to a perjury charge); and (c) his right to have the change of plea proceedings presided over by a district judge instead of a magistrate judge. The defendant was also explained the differences between the appointment and functions of the two. The defendant consent to proceed before this magistrate judge.

III. Proceedings Under Rule 11, Federal Rules of Criminal Procedure

A. Compliance With Requirements Rule 11(c)(1)

Rule 11 of the Federal Rules of Criminal Procedure governs the acceptance of guilty pleas to federal criminal violations. Pursuant to Rule 11, in order for a plea of guilty to constitute a valid waiver of the defendant's right to trial, guilty pleas must be knowing and voluntary: "Rule 11 was intended to ensure that a defendant who pleads guilty does so with an 'understanding of the nature of the charge and consequences of his plea.'" United States v. Cotal-Crespo, 47 F.3d 1, 4 (1st Cir. 1995) (quoting McCarthy v. United States, 394 U.S. 459, 467 (1969)). [There are three core concerns in these proceedings]: 1) absence of coercion; 2) understanding of the charges; and 3) knowledge of the consequences of the guilty plea. United States v. Cotal-Crespo, 47 F.3d at 4 (citing United States v. Allard, 926 F.2d 1237, 1244-45 (1st Cir. 1991)).

United States v. Hernández-Wilson, 186 F.3d 1, 5 (1st Cir. 1999).

In response to further questioning, defendant was explained and he understood that if convicted on count one, the penalty is a term of imprisonment of not more than 10 years and a term of supervised release of not more than three years. The court may also impose a fine not to exceed \$250,000.

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The defendant agrees to pay a special a mandatory penalty assessment of \$100 per count of conviction, to be deposited in the Crime Victim Fund, pursuant to 18 U.S.C. § 3013.

Defendant acknowledges that the court may impose a sentence in accordance with the applicable provisions of the Sentencing Guidelines, 18 U.S.C. § 3551 et seq., which are now advisory. The defendant acknowledges and is aware that parole has been abolished and the imposition of sentence may not be suspended. The defendant is also aware that, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the court may accept or reject the plea agreement, or may defer its decision as to its acceptance or rejection until it has considered the presentence report. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, and afford the defendant an opportunity to withdraw the guilty plea and advise the defendant that if the defendant persists in a guilty plea, the disposition of the case may be less favorable to the defendant than that contemplated in the plea agreement. In addition, as part of the terms and conditions of this plea agreement, the parties agree that, should the court reject the plea agreement, the United States reserves the right to withdraw from its obligations under the same.

Defendant was explained what the supervised release term means. It was emphasized that cooperation with the United States Probation officer would assist the court in reaching a fair sentence.

The defendant is aware that the court may order him to pay a fine sufficient to reimburse the government for the costs of any imprisonment, probation or supervised release. The defendant agrees to produce complete information regarding all restitution victims and agrees to execute a financial statement to the United States.

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3 Emphasis was made on the fact that at this stage, no prediction or promises
4 as to the sentence to be imposed could be made by anyone. Defendant responded to
5 questions in that no promises, threats, inducements or predictions as to what
6 sentence will be imposed have been made to him.

7 B. Admonishment of Constitutional Rights

8 To assure defendant's understanding and awareness of his rights, defendant
9 was advised of his right:

10 1. To remain silent at trial and be presumed innocent, since it is the
11 government who has the burden of proving his guilt beyond a reasonable doubt.

12 2. To testify or not to testify at trial, and that no comment could be made by
13 the prosecution in relation to his decision not to testify.

14 3. To a speedy trial before a district judge and a jury, at which he would be
15 entitled to see and cross examine the government witnesses, present evidence on his
16 behalf, and challenge the government's evidence.

17 4. To have a unanimous verdict rendered by a jury of twelve persons which
18 would have to be convinced of defendant's guilt beyond a reasonable doubt by means
19 of competent evidence.

20 5. To use the subpoena power of the court to compel the attendance of
21 witnesses.

22 Upon listening to the defendant's responses, observing his demeanor and his
23 speaking with his attorney, that to the best of counsel's belief defendant had fully
24 understood his rights, it is determined that defendant is aware of his constitutional
25 rights.

26 C. Consequences of Pleading Guilty

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3 Upon advising defendant of his constitutional rights, he was further advised
4 of the consequences of pleading guilty. Specifically, defendant was advised that by
5 pleading guilty and upon having his guilty plea accepted by the court, he will be
6 giving up the above rights and would be convicted solely on his statement that he is
7 guilty.

8 Furthermore, the defendant was admonished of the fact that when he were
9 under supervised release, and upon violating the conditions of such release, that
10 privilege could be revoked and he could be required to serve an additional term of
11 imprisonment.

12 D. Plea Agreement

13 The parties have entered into a written plea agreement that, upon being signed
14 by the government, defense attorney and defendant, was filed and made part of the
15 record. Defendant was clearly warned and recognized having understood that:

16 1. The plea agreement is binding upon the sentencing court if approved.
17 2. The plea agreement is an "agreement" between the defendant, defense
18 attorney and the attorney for the government which is presented as a
19 recommendation to the court in regards to the applicable sentencing adjustments
20 and guidelines, which are advisory.

21 3. The agreement provides a sentencing recommendation and/or anticipated
22 sentencing guideline computation, that can be either accepted or rejected by the
23 sentencing court.

24 4. In spite of the plea agreement and any sentencing recommendation
25 contained therein, the sentencing court retains full discretion to reject such plea
26 agreement.

27 Defendant acknowledged having understood this explanation.
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3 E. Government's Evidence (Basis in Fact)

4 The government presented a proffer of its evidence with which the defendant
5 basically concurred.

6 Accordingly, it is determined that there is a basis in fact and evidence to
7 establish all elements of the offense charged.

8 F. Voluntariness

9 The defendant accepted that no leniency had been promised, no threats had
10 been made to induce him to plead guilty and that he did not feel pressured to plead
11 guilty. He came to the hearing for the purpose of pleading guilty and listened
12 attentively as the prosecutor outlined the facts which it would prove if the case had
13 proceeded to trial.

14 IV. Conclusion

15 The defendant, by consent, has appeared before me pursuant to Rule 11,
16 Federal Rules of Criminal Procedure, and has entered a plea of guilty as to count one
17 of the indictment.

18 After cautioning and examining the defendant under oath and in open court,
19 concerning each of the subject matters mentioned in Rule 11, as described in the
20 preceding sections, I find that the defendant Johnny Pérez-Rivera is competent to
21 enter this guilty plea, is aware of the nature of the offense charged and the
22 maximum statutory penalties that the same carries, understands that the charge is
23 supported by the government's evidence, has admitted to every element of the
24 offense charged, and has done so in an intelligent and voluntary manner with full
25 knowledge of the consequences of his guilty plea.
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Therefore, I recommend that the court accept the guilty plea of the defendant and that the defendant be adjudged guilty as to count one of the indictment. Upon sentencing, the United States will move to dismiss counts two of the indictment.

This report and recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B) and Rule 72(d) of the Local Rules of Court. Any objections to the same must be specific and must be filed with the Clerk of Court within five (5) days of its receipt. Rule 510.1, Local Rules of Court; Fed. R. Civ. P. 72(b). Failure to timely file specific objections to the report and recommendation is a waiver of the right to review by the district court. United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986).

At San Juan, Puerto Rico, this 31st day of July, 2009.

S/ JUSTO ARENAS
Chief United States Magistrate Judge